1982

Lynn R. Preece v. Mark V. Preece : Respondent Brief

Utah Supreme Court

Pete N. Vlahos; Attorney for Appellant;
Lyle W> Hillyard; Hillyard, Low & Anderson; Attorney for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

LYNN R. PREECE, Plaintiff and Appellant, vs. MARK V. PREECE, Defendant and Respondent,	)	Case No. 18295

Respondent ~~REPLY~~ BRIEF

Appeal from the Judgment of the
District Court of Cache County, Utah
The Honorable VeNoy Christofferson
District Court Judge

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REPLY BRIEF

NATURE OF CASE

This is an action of divorce by Lynn R. Preece, Plaintiff and Appellant (herein called Appellant) against Mark V. Preece, Defendant and Respondent (herein called Respondent).

DISPOSITION BY THE TRIAL COURT

A divorce trial was held on October 27, 1981, where personally appeared the Appellant and her attorney and the Respondent and his attorney. The Court, at the conclusion of the trial, granted a Decree of Divorce to Appellant setting forth the terms to be included therein, waiving the interlocutory period and making the same final upon signing. Appellant's attorney prepared the Findings of Facts, Conclusions of Law and Decree and mailed those to counsel for the Respondent. Respondent's attorney questioned one provision in the Findings

as not being a part of the oral order of the court, and submitted the documents by letter to the trial judge for signature with a request that the paragraph in question in the Findings be deleted. There was no concern regarding the wording of the Conclusions of Law and the Decree of Divorce. Before the trial court could decide whether the paragraph in question in the Findings of Fact should be included or not, the Respondent died. Counsel for the Respondent petitioned the Court for a judgment nunc pro tunc, which the Court, after oral argument by the attorneys for the parties, granted.

RELIEF SOUGHT ON APPEAL

Respondent seeks to enforce the judgment nunc pro tunc of the Divorce Decree granted by the Trial Court.

STATEMENT OF THE FACTS

The parties were married on March 4, 1976 (Trial Transcript, p. 3), it being the Appellant's fourth marriage (Trial Transcript, p. 26) and the Respondent's third marriage (Trial Transcript, p. 26). Appellant sold land that she owned in Weber County, Utah prior to the marriage and from the net equity of $7,800 helped to purchase a trailer home in which the parties lived with their separate families by prior marriages on a family farm which the Respondent operated in Cache County, Utah (Trial Transcript, pp. 4-5). The farm in Cache County, Utah where the trailer was located was land where Respondent had been born and was acquired by the Respondent in a deed from his parents in 1975 wherein his

parents retained life estate interests (Trial Transcript p. 10). Appellant knew how title was held at the time of the marriage (Trial Transcript, p. 28). Respondent's mother died on June 26, 1977 (Trial Transcript, p. 49), and his father died on February 8, 1979 (Trial Transcript pp. 29 and 50). Appellant's name was never placed on the title of the land (Trial Transcript, p. 20). The parties separated August 1, 1979, (Trial Transcript, p. 17) and had not even seen each other since August of 1980 (Trial Transcript, p. 65). Appellant requested the divorce be finalized immediately (Trial Transcript, p. 4) and testified there was no possibility of reconciliation (Trial Transcript, p. 21). The farmland was appraised for the divorce trial as worth $143,000 as of the time of the divorce trial (Ex. 3). Any increase in the value of the land from the time of the marriage to the time of separation and later the divorce was due to natural appreciation (Ex. 3).

The Court, after hearing all the evidence, granted a decree of divorce, making the same final on signing, and made an order relative to the return of certain property, awarded to Appellant a judgment for her investment in certain items of personal property and a share of the natural appreciation of the land during the time the parties lived together, restored to Appellant her prior married name, ordered Respondent to assume certain debts, and ordered each party to pay their own expenses and costs (Trial Transcript, p. 79-84).

Appellant's counsel mailed the Findings of Fact, Conclusions of Law and Decree which he had prepared on November 12 1981. Respondent's attorney received the documents on November 14, 1981 (see p. 34 of Court's file). Respondent's attorney mailed those documents to his client for his review before approval and received a call from Respondent several days later indicating that the Respondent had been ill and hospitalized with a jaundice problem, so arrangements were made for the Respondent and his attorney to visit at the hospital for Respondent to review the papers, approve them as to form and better understand the Order. Everything was agreed in the papers as to form except for paragraph 9 of the Findings of Fact, which stated: "That the Plaintiff has retained Attorney Pete N. Vlahos to represent her and has incurred reasonalbe [sic] attorney fees and costs."

Because this was not a major disagreement and really had no impact on the written Conclusions and Decree, counsel chose to mail the documents with a letter to the Court on December 3, 1981, asking the Court to strike the said paragraph in the Findings as he signed all the documents. There was no formal motion filed and no further testimony and argument were necessary because the trial had been completed. On the same day that the papers were mailed to the trial judge, the Respondent suddenly died of a heart attack unrelated to the illness for which he had been hospitalized.

Respondent's counsel immediately petitioned the Trial

Court for a nunc pro tunc order entering the Divorce Decree. The Court upon hearing argument and briefs of counsel, granted the nunc pro tunc order, making the divorce effective as of the date of the hearing and oral order, to-wit: October 27, 1981. The effect of said hearing was to deny the Appellant the position of a surviving spouse in the Respondent's intestate probate estate. Therefore, she could not claim the position of personal representative or statutory interest as a surviving spouse in the Preece family farm, thus allowing the family farm to pass under the intestate law to the Respondent's three natural born children from a previous marriage and leaving to the Appellant her claim against the estate for the amount awarded to her by Judge Christoffersen after the trial on her divorce complaint.

ARGUMENT

I

THE TRIAL COURT HAS THE POWER TO GRANT A DECREE OF DIVORCE BY MEANS OF A NUNC PRO TUNC PETITION.

Utah Rules of Civil Procedure, Rule 58A(d) specifically provides for such a case and states:

> If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

The authority of a court to enter a judgment nunc pro tunc exists at common law and is not dependent upon statute. The powers of discretion should not be exercised where to do so would injuriously affect the intervening rights of third

parties or otherwise cause injustice. But on the other hand, should be exercised where injustice would occur if not done and where the material facts were decided in the manner recognized by law. See 46 Am.Jur.2d Judgments, paragraphs 97, 98, 196 and 223. The Trial Court in this case, on which sat the trial judge who heard the divorce matter, granted the Petition after considering the file, hearing arguments of counsel, certainly had the jurisdiction and power to grant the Divorce Decree as a judgment nunc pro tunc, under the rule cited above, and supplemented by the inherent power of the Court under common law.

II

THE DISCRETION OF THE TRIAL COURT IN ENTERING THE JUDGMENT NUNC PRO TUNC IN THIS CASE SHOULD BE AFFIRMED FOR THE FOLLOWING REASONS:

A. THE MATTER BETWEEN THE PARTIES WAS FULLY AND COMPLETELY ADJUDICATED AT A TRIAL AND A FINAL ORDER HAD BEEN GRANTED, WITH THE SOLE REMAINING ACTION BEING MERELY TO SIGN THE PAPERS.

B. GROSS INJUSTICE AND INEQUITY WILL OCCUR IF THE COURT FAILS TO RECOGNIZE THE JUDGMENT NUNC PRO TUNC, AS SUCH ACTION WILL AWARD AN INTEREST TO A LONG-TIME FAMILY FARM TO THE APPELLANT, A WIFE OF SHORT DURATION, AND ACQUIRED PRIOR TO THIS MARRIAGE AS AGAINST RESPONDENT'S NATURAL CHILDREN WHO WANT TO CONTINUE THE FAMILY FARMING OPERATION.

C. THE ISSUE RAISED BY APPELLANT IN HER BRIEF THAT THERE WERE STILL UNDECIDED ISSUES BEFORE THE DECREE COULD BE SIGNED WAS NEVER PROPERLY RAISED BEFORE THE TRIAL COURT AND THEREFORE THE APPELLANT SHOULD BE FORECLOSED OF RAISING THAT ISSUE ON APPEAL.

A. THE MATTER BETWEEN THE PARTIES WAS FULLY AND COMPLETELY ADJUDICATED AT A TRIAL AND A FINAL ORDER HAD BEEN GRANTED, WITH THE SOLE REMAINING ACTION BEING MERELY TO SIGN THE PAPERS.

The issue of divorce and the property settlement between the parties was fully litigated on October 27, 1981, and the verbal order of the Court was made, making the Divorce Decree final between the parties subject only to the documents being drafted by the attorneys and signed by the Court. The parties had been separated and living apart for over two years after only three years of marriage. The only matter still pending was the signing of the documents by the Court after a question had been resolved over the appropriateness of paragraph 9 of the Findings. Appellant's attorney at trial presented evidence of attorney fees (Trial Transcript, pp. 22-23), but the Court clearly ordered each party to pay their own attorney fees (Trial Transcript, p. 82, and Appellant's Conclusions of Law, paragraph 9, and Decree of Divorce, paragraph 8). There were no motions filed. The prepared documents were submitted to the Court with a request to strike paragraph 9 of the Findings as they were not Findings made by the Court. There was no need of any further testimony or oral argument. The Court could decide by checking the record.

It is for a case like this that Rule 58A(d), Utah Rules of Civil Procedure, cited above and the use of nunc pro tunc orders are really designed to meet. Numerous state courts have followed this procedure.

In the case of In re Tahery, 14 Wash.App. 27, 540 P.2d 474 (1975), the Court found that the trial court has the inherent discretionary power to enter judgment nunc pro tunc even with a divorce action. The Court also cited equitable considerations in granting the nunc pro tunc order and cited the following from H. Clark, The Law of Domestic Relations, 384 (1968):

> One final rule governing parties to divorce suits says that the death of a party at any time before the entry of the final decree abates the action automatically. This result occurs even though the death follows an interlocutory decree of divorce. It does not, however, where the case was fully adjudicated so that a final decree should have been entered before the death of a party but the decree was not in fact entered for some reason. In this unusual situation a divorce decree nunc pro tunc may be entered. (Emphasis added.)

The Supreme Court of Appeals of West Virginia in the case of Cameron v. Cameron, 105 W.Va. 621, 143 S.E. 349 (1928), held that a decree of divorce nunc pro tunc was proper where, as in our case, everything had been done but for the signing of the papers. That Court noted the difference where the decree was interlocutory and death occurred before it was scheduled to become final.

The Supreme Court of Ohio cited the article at 104 ALR 654 at page 664 as authority for a similar holding in the case of Caprita v. Caprita, 145 Ohio St. 5, 60 N.E.2d 483 (1945):

> The general rule, so far as a general rule may be deduced from the few cases falling within this subdivision, is that, if

> the facts justifying the entry of a decree were adjudicated during the lifetime of the parties to a divorce action, so that a decree was rendered or could or should have been rendered thereon immediately, but for some reason was not entered as such on the judgment record, the death of one of the parties to the action subsequently to the rendition thereof, but before it is in fact entered upon the record, does not prevent the entry of a decree nunc pro tunc to take effect as of a time prior to the death of the party.

The cases cited thereafter support Respondent's position in this case.

Appellant's cases are not in point. The cases of Wilson v. Wilson, 73 Mich. 620, 41 N.W. 817 (1889); Sahler v. Sahler 17 So.2d 105 (Fla. 1944); and Heil v. Rogers, 369 S.W.2d 388 (Kansas City Ct. of Appeals, Missouri 1959), involved cases where the matter was still under advisement or no final pronouncement was made when a party died. In the case of State ex rel Tufton v. Superior Court, 46 Wash. 395, 90 P. 258 (1907), the Court relied on the long delay by the party seeking relief and ruled he was estopped. The case of Mabry v. Baird, 203 Okla. 2112, 219 P.2d 234 (1950), actually allowed the divorce decree to be entered and allowed additional evidence on the issue of attorney fees to be included in a hearing after death. The case of Daly v. Daly, 533 P.2d 884 (Utah 1975), involved a case where death occurred during the interlocutory period. That is different from this case where the Court waived the interlocutory period and made the Decree final upon signing. See Cameron v. Cameron, cited above. The undersigned submits that if the Court,

despite this clear distinction, finds that the Daly case is controlling, then this Court should overrule the Daly case and follow Rule 58A(d) Utah Rules of Civil Procedure and leave the matter to the discretion of the Trial Court, which is in a better position to decide whether a death before the final docketing of the final order is a sufficient change of circumstances to warrant a change of the oral order.

Finally, the case of Glad v. Glad, 567 P.2d 160 (Utah 1977), involved filing motions objecting to Findings and Conclusions. This case involved a letter to the Court to strike one paragraph from the Findings as not being covered by the ruling of the Court. It may have delayed the actual signing of the papers for several days but in light of the long separation of the parties and the case being decided at the trial this short delay was meaningless.

This case was as final after the hearing on October 27, 1981, as a divorce case can be. The attorneys had even agreed on the wording for the Conclusions of Law and the Decree.

B. GROSS INJUSTICE AND INEQUITY WILL OCCUR IF THE COURT FAILS TO RECOGNIZE THE JUDGMENT NUNC PRO TUNC, AS SUCH ACTION WILL AWARD AN INTEREST OT A LONG-TERM FAMILY FARM TO THE APPELLANT, A WIFE OF SHORT DURATION, AND ACQUIRED PRIOR TO THIS MARRIAGE AS AGAINST RESPONDENT'S NATURAL CHILDREN WHO WANT TO CONTINUE THE FAMILY FARMING OPERATION.

It appears to the undersigned that the sole reason that the Appellant objects to the nunc pro tunc order is to get a

greater share of the Respondent's estate as his surviving widow than she received under the Divorce Decree after the trial. There appears no desire to return and operate the family farm or help Respondent's children as their stepmother. Appellant herself sought to have the divorce made final upon the hearing, indicating as grounds for the divorce her problems with Respondent's children (Trial Transcript, p. 70). In not sustaining the Trial Court's action, this Court would increase the Appellant's claim against Respondent's estate from the $14,605 set at trial to one-half of the Respondent's estate (§ 75-2-102(1)(3) Utah Code Ann. (1953) as amended), of which the family farm at least is included with an appraisal value as of October 27, 1981, of $143,000 (Ex. 3), to the detriment of the three natural children of the Respondent, who, without the claim of the Appellant, would inherit the family farm. Respondent could have prevented this by a will or prenuptial agreement, but as happens in so many cases, he certainly had no foreknowledge of a divorce or a sudden death. His hospitalization was not life-threatening.

A divorce action is one of equity. The rules clearly provide that the Court has the power to enter a Divorce Decree where judgment was rendered but not signed before death. By sustaining the action of the Trial Court, the natural object of a person's family farm went to the persons that Respondent would want it to go to.

C. THE ISSUE RAISED BY APPELLANT IN HER BRIEF THAT THERE WERE STILL UNDECIDED ISSUES BEFORE THE DECREE COULD BE SIGNED WAS NEVER PROPERLY RAISED BEFORE THE TRIAL COURT AND THEREFORE THE APPELLANT SHOULD BE FORECLOSED OF RAISING THAT ISSUE ON APPEAL.

The undersigned directs the Court to the issues raised by the Appellant in resisting the Respondent's motion for a judgment nunc pro tunc (see Court File, pp. 43-60). Appellant claims basically that the Court is without jurisdiction to grant such an order because of Respondent's death before the Divorce Decree was signed (Court's File, pp. 43-60). Further, in the transcript of the oral argument held before the Trial Court on February 1, 1982, with H. Don Sharp appearing for Appellant, the parties outlined their position before the Court. No mention is made of the claim that there were still unresolved issues. The sole claim was that Respondent's death before the actual papers were signed made the oral judgment stated at the conclusion of the trial void. The claim in Appellant's brief of substantial unresolved issues with the written documents is a new claim raised before the Supreme Court for the first time. This Court has clearly held that issues raised for the first time on appeal are not considered and therefore this Court can disregard that portion of the Appellant's argument. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982).

CONCLUSION

This is a case where the judgment nunc pro tunc was properly granted and where the Trial Court, which should and does have discretion to take this proper action, was clearly justified by the record. The Trial Court had the advantage of reviewing the long-time separation, the different assets owned by the parties, the number of marriages, the finality of the divorce they were seeking, and the equity of the parties as to where the family farm asset should go with Respondent's sudden untimely death.

RESPECTFULLY SUBMITTED this 27th day of July, 1982.

HILLYARD, LOW & ANDERSON

LYLE W. HILLYARD

Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 27 day of July, 1982, I mailed two (2) true and correct copies of the above and foregoing REPLY BRIEF by placing same in the United States Mail, postage prepaid, and addressed to the following:

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Ruth Bolton
Secretary